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In early 1998, in Brownsville, Texas, Rodolfo Vasquez-Bernal was arrested and charged with violating 8 U.S.C. § 1326(a), an immigration statute that makes it a felony for a previously deported alien to return to the United States without the permission of the government.[1] Although a simple violation of the statute only carries a two-year maximum prison sentence, an alien who illegally reenters this country and whose previous deportation followed his conviction for a felony faces a statutory maximum prison sentence of twenty years.[2]

Vasquez, a Mexican citizen who dropped out of school after the fourth grade, appeared in federal district court in Brownsville and entered a plea of guilty to the indictment pursuant to Federal Rule of Criminal Procedure 11.[3] The district

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1. *See* Volume 1, District Court Record at 22, United States v. Vasquez-Bernal (S.D. Tex.) (Cr. No. B-98-40).

2. 8 U.S.C. § 1326(b) (1999). Subsection (b) provides that the maximum punishment is twenty years for defendants previously convicted of enumerated "aggravated" felonies (including drug-trafficking and violent offenses) and ten years for defendants previously convicted of non-aggravated felonies. *See* 8 U.S.C. §§ 1101(a)(43) & 1326(b)(1), (2). The corresponding punishment ranges in the United States Sentencing Guidelines also vary depending on a defendant's prior criminal record. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (1998).

3. Volume 1, District Court Record at 2, *Vasquez-Bernal* (Cr. No. B-98-40). Rule 11 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (c) Advice to defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
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> > (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines

under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring that the plea is voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) Plea Agreement Procedure.

(1) In general. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case. The court shall not participate in any such discussions.

(2) Notice of such agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a plea agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of plea agreement. If the court rejects the plea agreement, the

judge conducted Vasquez's rule 11 proceeding at the same time that the court conducted the rule 11 proceedings of ten other defendants charged with various other criminal offenses that carried different penalty ranges from 8 U.S.C. § 1326.[4] At the joint rule 11 hearing, the district court entirely failed to warn Vasquez that he was facing a maximum sentence of up to twenty years in prison.[5] The district court subsequently sentenced Vasquez to forty-six months in federal prison.[6]

Vasquez appealed his conviction to the United States Court of Appeals for the Fifth Circuit. In his appellate brief, Mr. Vasquez challenged his conviction on the ground that he had not been advised of the range of punishment at his guilty plea proceeding in clear violation of Federal Rule of Criminal Procedure 11(c)(1).[7] In its responsive brief, the Government

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court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement . . . .

(f) Determining accuracy of plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

FED. R. CRIM. P. 11(c)-(h).

4. Volume 2, District Court Record at 1, *Vasquez-Bernal* (Cr. No. B-98-40). The "mass plea" procedure employed by the district court was formerly commonplace in federal criminal cases, but gave way to individual rule 11 proceedings in the 1970s after being strongly criticized. United States v. Coronado, 554 F.2d 166, 172 (5th Cir. 1977) (Goldberg, J.) ("We have banished from our jurisprudence the days when defendants were lined up and the guilty pleas were taken in wholesale lots without individualization. . . . Even a plea taking session should have more dignity than a bargain basement sale at a department store."). The "mass plea" procedure has again become commonplace in many district courts in Texas, where federal district courts are "sinking in the floodtide of [immigration-related] cases." United States v. Vasquez-Bernal, 197 F.3d 169, 171 (5th Cir. 1999) (Walter & Wiener, JJ., concurring).

5. Volume 2, District Court Record at 21-29, *Vasquez-Bernal* (Cr. No. B-98-40).

6. Volume 3, District Court Record at 7, *Vasquez-Bernal* (Cr. No. B-98-40).

7. *See* Appellant's Brief at 7-8, United States v. Vasquez-Bernal (5th Cir. 1999) (No. 98-40553); *see also* Petition for Rehearing En Banc at 6-14, *Vasquez-Bernal* (No. 98-

"concede[d], as it must, that there is nothing in th[e] [district court] record to reflect that Vasquez was informed by the court prior to pleading guilty that he faced a maximum punishment of 20 years[']] imprisonment."[8] However, the Government contended that the error was harmless under Federal Rule of Criminal Procedure 11(h).[9]

After initially dismissing Vasquez's direct appeal as "frivolous" in an unpublished opinion,[10] the Fifth Circuit on November 29, 1999, issued a revised opinion that concluded that the district court violated Federal Rule of Criminal Procedure 11(c)(1)—by failing to warn Vasquez of the statutory range of punishment before accepting his plea of guilty—but held that the district court's error was harmless.[11] Although nothing in the record showed that Vasquez knew the statutory range of punishment when he pleaded guilty, the court reasoned that the error was nevertheless harmless because:

> Vasquez-Bernal does not argue that he would not have pled guilty had he been personally informed of the punishment range for his crime; he merely argues that the court's error mandates a reversal of his conviction. . . . Vasquez-Bernal has offered no proof—not even an allegation—that the punishment information omitted from his plea hearing would have altered his plea to the illegal entry charge. . . . Lacking such proof and finding no rational basis under the circumstances to conclude that Vasquez- Bernal would have pled differently had he been properly advised of the punishment range for his offense, we find no merit in appellant's argument.[12]

Vasquez-Bernal's petition for a writ of certiorari subsequently was denied by the United States Supreme Court.[13]

40553).

8. Plaintiff-Appellee's Brief at 11, *Vasquez-Bernal* (No. 98-40553).

9. *Id.* at 12.

10. United States v. Vasquez-Bernal, No. 98-40553, 192 F.3d 126 (5th Cir. Aug. 5, 1999) (table case).

11. United States v. Vasquez-Bernal, 197 F.3d 169, 170 (5th Cir. 1999).

12. *Id.* at 171 (citations omitted).

13. Vasquez-Bernal v. United States, 120 S. Ct. 966 (2000).

* * *

As discussed below, the United States Court of Appeals for the Fifth Circuit has repeatedly applied rule 11(h)'s harmless error standard to rule 11 errors in a manner that is contrary to numerous decisions of both the Supreme Court and other United States Courts of Appeals. The Fifth Circuit is not the only circuit to erroneously apply rule 11(h), although *Vasquez-Bernal* presents perhaps the most flagrant misapplication of the rule by a lower court.

A. The Supreme Court's Guilty Plea Jurisprudence

In 1969, in two landmark cases, *Boykin v. Alabama*[14] and *McCarthy v. United States*,[15] the Supreme Court dramatically altered the prevailing procedures applicable to trial courts' taking of guilty pleas, particularly in the federal system. In *Boykin*, the Court held that, in order for a criminal defendant's plea of guilty to pass constitutional muster on appeal, the record of the district court proceedings must disclose that the plea was made in a knowing, voluntary, and intelligent manner.[16] The Court stated that the Constitution "demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea [of guilty] connotes," including an explanation of "the nature of the charges," and a warning of the "consequences" of a guilty plea.[17] Such "consequences," the Court noted, would include the applicable "range of sentences" corresponding to the charge or charges.[18] Because the record in *Boykin* did not disclose a knowing, voluntary, and intelligent guilty plea, the Court reversed the defendant's conviction.[19] In a subsequent case discussing *Boykin*, the Court held that when a

14. 395 U.S. 238 (1969).

15. 394 U.S. 459 (1969).

16. *Boykin*, 395 U.S. at 244.

17. *Id.* at 243-44 & n.7. The following year in *Brady v. United States*, 397 U.S. 742 (1970), the Court repeated that a defendant does not voluntarily enter a plea of guilty unless he is "'fully aware of the direct consequences'" of the plea. *Id.* at 755 (citation omitted).

18. *Id.* at 244 n.7.

19. *Id.* at 244.

defendant challenges his guilty plea on direct appeal and the record does not "affirmatively show" that *Boykin*'s commands were complied with by the trial court, there is a "presumption" that the plea is constitutionally invalid.[20]

In *McCarthy*, the Court addressed a federal district judge's failure to comply with the requirements of rule 11. Although the Court was applying rule 11 rather than addressing a constitutional challenge to a guilty plea conviction (as in *Boykin*), the Court nevertheless noted that rule 11 has constitutional implications because the procedures required by the rule are intended to assure that a defendant's plea is constitutionally valid.[21] The Court held that the district judge's acceptance of the defendant's plea without compliance with rule 11's requirements requires automatic reversal of the defendant's conviction.[22] The Court held that such an automatic reversal was an appropriate remedy because it cannot be "assumed" that a defendant entered a knowing, voluntary, and intelligent guilty plea when the district court's failure to comply with rule 11 resulted in a silent record regarding the defendant's knowledge of the information required by rule 11.[23] That is, just as in *Boykin*, the Court in *McCarthy* presumed based on a silent record that a defendant lacked the requisite information to enter a valid guilty plea. In that regard, the Court forbade "speculation" by an appellate court about what a defendant actually knew when the record was silent.[24]

In two subsequent cases, the Court limited the reach of *Boykin* and *McCarthy* by holding that such a presumption of an invalid plea based on a silent record was appropriate only on direct appeal and not on habeas corpus or "collateral" review.[25] On collateral review, a defendant has the burden to show that a district court's violation of the procedural requirements of

20. Parke v. Raley, 506 U.S. 20, 29 (1992).

21. *McCarthy*, 394 U.S. at 466.

22. *Id.* at 469.

23. *Id.* at 464-65, 467.

24. *Id.* at 471.

25. *See Parke*, 506 U.S. at 29 (*Boykin*'s presumption is inapplicable to collateral challenges to guilty pleas); United States v. Timmreck, 441 U.S. 780, 783-84 (1979) (*McCarthy*'s rule of automatic reversal is inapplicable to collateral challenges to guilty pleas).

Boykin or rule 11 actually prejudiced the defendant in a manner that rendered his guilty plea invalid.[26]

B. Rule 11(h)'s History and Purpose

In 1983, rule 11 was amended by the addition of subsection (h), which provides:

> (h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.[27]

The Notes of the Advisory Committee on Rules[28] state that, "[s]ubdivision (h) makes clear that the harmless error rule of [Fed. R. Crim. P.] 52(a) is applicable to Rule 11."[29] The Committee stated that a more precise definition of what is harmless error in this context "is left to the caselaw."[30] The clear purpose of subsection (h) was to modify *McCarthy*'s rule of automatic reversal for any and all rule 11 violations. According to the Advisory Committee, appellate courts should find harmless "minor or technical" violations of rule 11, violations

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26. *Parke*, 506 U.S. at 29; *Timmreck*, 441 U.S. at 783-84. Another noteworthy Supreme Court decision is *Henderson v. Morgan*, 426 U.S. 637 (1976). In *Henderson*, the Court addressed a defendant's challenge to his guilty plea on the ground that he was unaware of the nature of the charge, including the elements of the offense, during the plea hearing. *Id.* at 643-44; *cf.* FED. R. CRIM. P. 11(c)(1) (district court must explain to a defendant "the nature of the charge to which the plea is offered"). The Court recognized that a defendant's ignorance of the nature of the charge rendered his guilty plea involuntary "in a constitutional sense" under the Due Process Clause. *Henderson*, 426 U.S. at 644-45. Significantly, in addressing the prosecution's harmless error arguments, the Court held that the error was not harmless even if it was clear that the defendant "probably would have pleaded guilty anyway" had he known the nature of the charge. *Id.* at 644 n.12. Similarly, the Court rejected the argument that the error was harmless in view of the "overwhelming evidence of guilt available." *Id.* at 644.

27. FED. R. CRIM. P. 11(h).

28. In interpreting rule 11, the Supreme Court has recognized the importance of the Advisory Committee Notes. *See, e.g.*, United States v. Hyde, 520 U.S. 670, 676 (1997). The Notes are, in effect, the legislative history equivalent of a conference committee report accompanying a piece of legislation.

29. FED. R. CRIM. P. 11 advisory committee notes; *see* FED. R. CRIM. P. 52(a) ("Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

30. FED. R. CRIM. P. 11 advisory committee notes. "This amendment has been criticized for failing to adequately define harmless error." United States v. McGeehan, 824 F.2d 677, 680 (8th Cir. 1987).

which "could not have had any impact on the defendant's decision to plead [guilty]."[31]

The Advisory Committee, however, added the following important caveat to its new harmless error rule:

> [T]he Advisory Committee does wish to emphasize two important cautionary notes. The first is that subdivision (h) should *not* be read as supporting extreme or speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards. There would *not* be harmless error under subdivision (h) where, for example, as in *McCarthy*, there had been absolutely no inquiry by the judge into defendant's understanding of the nature of the charge and the harmless error claim of the government rests upon nothing more than the assertion that it may be "assumed" [the] defendant possessed such understanding merely because he expressed a desire to plead guilty. . . . Indeed, it is fair to say that the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited . . . .
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> The second cautionary note is that subdivision (h) should *not* be read as an invitation to trial judges to take a more casual approach to Rule 11 proceedings. . . . Subdivision (h) makes *no change* in the responsibilities of the judge at Rule 11 proceedings, but instead merely rejects the extreme sanction of automatic reversal.[32]

C. The U.S. Courts of Appeals' Conflicting Applications of Rule 11(h)

Since 1983, every United States Court of Appeals has applied rule 11(h) to various rule 11 violations by district courts at guilty plea proceedings. As discussed below, the "voluminous jurisprudence" regarding rule 11(h)[33] has resulted in vast disarray among the lower federal courts.[34] The clear majority of

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31. FED. R. CRIM. P. 11 advisory committee notes.

32. *Id.* (emphasis added).

33. United States v. Johnson, 1 F.3d 296, 302 (5th Cir. 1993) (en banc).

34. Within five years of rule 11(h)'s promulgation, numerous circuits already were divided on its proper application. *See* United States v. Bernal, 861 F.2d 434, 436 (5th Cir. 1988) (discussing the conflicting approaches of numerous circuits regarding rule 11(h)). As discussed *infra*, that division has only grown over the following decade.

appellate decisions have applied rule 11(h) in direct appeal cases in a manner faithful to the foregoing Advisory Committee Notes and the Supreme Court's decisions in *McCarthy*, *Boykin*, and their progeny. For instance, in applying the harmless error standard, the Second Circuit has "adopted a standard of strict adherence to Rule 11" and warned district judges that "on direct appeal there will be little room for minimizing the effect of a failure to comply with Rule 11."[35] The Fifth Circuit has been on the opposite end of the spectrum, at least since its unanimous en banc decision in 1993 in *United States v. Johnson*,[36] which abrogated the Fifth Circuit's previous, less forgiving approach to rule 11(h) harmless error analysis.[37]

The most significant inter-circuit split regarding rule 11(h) concerns the issue of which party on direct appeal has the burden of persuasion under rule 11(h), the criminal defendant or the United States. As evidenced by the Fifth Circuit's recent decision in *Vasquez-Bernal* and numerous other decisions by that court on direct appeal since rule 11(h) was promulgated in 1983, the Fifth Circuit has repeatedly placed the burden on the criminal defendant to establish harm or prejudice resulting from the district court's rule 11 violation. In effect, the Fifth Circuit has applied the Supreme Court's approach in *Timmreck*—which involved a *collateral attack* on a guilty plea—to rule 11 claims raised on *direct appeal*.[38]

In *Vasquez-Bernal*, the Fifth Circuit held that the rule 11(c)(1) error was harmless because the defendant "has offered

35. *See, e.g.*, United States v. Livorsi, 180 F.3d 76, 78 (2d Cir. 1999) (citations and internal quotation marks omitted); United States v. Ferrara, 954 F.2d 103, 107 (2d Cir. 1992) (same).

36. United States v. Johnson, 1 F.3d 296 (5th Cir. 1993) (en banc).

37. *Id.* at 301-02. Prior to *Johnson*, the Fifth Circuit repeatedly held that a district court's failure to comply with certain provisions of Fed. R. Crim. P. 11—"core concern" provisions, including rule 11(c)(1)—automatically required reversal on direct appeal. *See, e.g.*, United States v. Pierce, 893 F.2d 669, 678-79 (5th Cir. 1990); United States v. Kahn, 588 F.2d 964, 964 (5th Cir. 1979) (per curiam); Government of Canal Zone v. Tobar T., 565 F.2d 1321, 1321 (5th Cir. 1978).

38. *See* United States v. Timmreck, 441 U.S. 780, 783-84 (1979) (in rejecting the defendant's rule 11 claim, the Court stated that the defendant "does not argue that he was actually unaware of the [applicable sentence] or that, if he had been properly advised by the trial judge, he would not have pleaded guilty"). In this regard, the Fifth Circuit has failed to appreciate the line between direct review and collateral review that the Supreme Court itself drew in *Timmreck*, *id.* at 783-84.

no proof—not even an allegation—that the punishment information omitted from his plea hearing would have altered his plea to the illegal reentry charge."[39] *Vasquez-Bernal* was the latest in a line of Fifth Circuit cases on direct appeal squarely placing the burden of persuasion under rule 11(h) on a defendant.[40]

The Fifth Circuit's cases holding that, when the appellate record is silent, a defendant on direct appeal has the burden to show actual prejudice are in conflict with numerous other circuits, which on direct appeal place the burden on the prosecution to show that the defendant was not harmed or prejudiced by the rule 11 violation.[41] The Ninth Circuit explicitly disagrees with the Fifth Circuit's approach:

> We suggest, respectfully, that such an approach misconstrues the harmless error principle of Rule 11(h).

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39. United States v. Vasquez-Bernal, 197 F.3d 169, 172 (5th Cir. 1999).

40. *See, e.g.*, United States v. Smith, 184 F.3d 415, 417 (5th Cir. 1999) (finding violations of rule 11(c)(1) harmless because "Smith does not maintain that she did not understand the charges at the time she pled guilty . . .[;] [rather,] she contends that the district court failed to personally ensure that she understood the charges"); *id.* at 417 (finding rule 11(d) error harmless because "Smith has not shown that the district court's failure to question her about the voluntariness of her plea affected her substantial rights" insofar as "[s]he does not contend that she actually pled guilty as a result of force, threats, or promises"); United States v. Francisco Mendoza-Mora, No. 98-20060, unpublished slip op., at 2 (5th Cir. Sept. 16, 1998) ("Mendoza does not state that his plea was the product of threats or force or that he would have pled differently had a proper Rule 11 colloquy taken place."), *cert. denied*, 119 S. Ct. 915 (1999); United States v. Williams, 120 F.3d 575, 577-78 (5th Cir. 1997) (finding rule 11(c)(1) error harmless because "Williams does not claim that he would have pled differently had he been informed of the applicable [statutory] maximum [punishment]"), *cert. denied*, 522 U.S. 1061 (1998); United States v. Thibodeaux, 811 F.2d 847, 848 (5th Cir. 1987) (in finding the district court's rule 11(e)(2) error harmless, the court stated: "Thibodeaux does not contend that he was under the impression that he could withdraw his plea if the judge did not follow the government's [sentencing] recommendation. Nor does he allege that he would have withdrawn his plea had the district judge given the Rule 11(e)(2) warning").

41. The Fifth Circuit's holding that a defendant seeking reversal under rule 11 has the burden to at least allege on direct appeal that he did not know of the relevant information and would not have pleaded guilty but for the rule 11 violation, *see* United States v. Vasquez-Bernal, 197 F.3d 169, 171 (5th Cir. 1999), contradicts the well-established rule that factual allegations *de hors* the record will not be considered on direct appeal. *See, e.g.*, United States v. Hay, 685 F.2d 919, 921 (5th Cir. 1982) ("[O]n a direct appeal of a conviction based upon a plea, complaints based upon facts outside the record are not before and will not be considered by the reviewing court.") (citing cases); *see also* FED. R. CRIM. P. 11(h) advisory committee notes (harmless error analysis "must be resolved solely on the basis of the Rule 11 transcript and other portions . . . of the limited record made in such cases").

> [The Fifth Circuit's approach] would effectively require the defendant to meet the burden of proving a negative—to show that he in fact did not understand the omitted Rule 11 advisement. We have no doubt that the Rule 11 harmless error clause imposes no such burden on the defendant. . . . [Rule 11(h)] requires an affirmative showing on the record that the defendant was actually aware of the advisement, not a showing by the defendant that he was unaware of the omitted advisement.[42]

The conflict between the Fifth and Ninth Circuits has spread over the years to other circuits as well. In addition to the Fifth Circuit, the First and Third Circuits have placed the burden of persuasion under rule 11(h) on the defendant rather than the United States on direct appeal.[43]

However, in addition to the Ninth Circuit in *Graibe*,[44] other circuits have placed the burden under rule 11(h)[45] on the

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42. United States v. Graibe, 946 F.2d 1428, 1433-34 (9th Cir. 1991) (criticizing the Fifth Circuit's decision in *Thibodeaux*).

43. The Ninth Circuit in *Graibe* noted that the Third Circuit had taken the same harmless error approach as the Fifth Circuit. *See Graibe*, 946 F.2d at 1434 (citing United States v. de le Puente, 755 F.2d 313, 315 (3d Cir. 1985)). The First Circuit also has placed the burden of persuasion on the defendant. *See* United States v. Ferguson, 60 F.3d 1, 4 (1st Cir. 1995) ("Nor does Ferguson suggest that if the [district] court had [complied with Rule 11(c)(1)], he would not have pled guilty."); *see also* United States v. Noriega-Millan, 110 F.3d 162, 167-68 (1st Cir. 1997) (citing *Thibodeax* with approval); *see generally* United States v. DeBusk, 976 F.2d 300, 305-06 (6th Cir. 1992) ("The courts of appeals are divided on the proper approach to a harmless error argument in cases in where the district court fails to follow the command of Rule 11(e)(2).").

44. *See also* United States v. Odedo, 154 F.3d 937, 940 (9th Cir. 1998) ("[a]ny deviation from the requirements of Rule 11 is reversible unless the government demonstrates that [the error] was harmless"; "[i]n the total absence of any reference [by the district court] at the plea hearing to the charge or its nature, we can assume nothing more than total ignorance of the charge on the part of [the defendant]") (citations and internal quotation marks omitted); United States v. Gastelum, 16 F.3d 996, 999-1000 (9th Cir. 1994); United States v. Jaramillo-Suarez, 857 F.2d 1368, 1372 (9th Cir. 1988) (refusing to deem the district court's rule 11(c)(1) error harmless because "[i]t does not appear from the record that Suarez knew the maximum sentence that could be imposed before he entered his [guilty] plea"); United States v. Kamer, 781 F.2d 1380, 1385-86 & n.2 (9th Cir. 1986) (In finding that rule 11(d) error was not harmless, the court reasoned: "If it is elsewhere evidenced, a trial judge's failure to demonstrate on the Rule 11 transcript that a defendant's plea was voluntary may be harmless error. . . . Here, however, we cannot discern voluntariness from even the entire record."); *cf.* United States v. Cross, 57 F.3d 588, 590-91 (7th Cir. 1995) (finding a rule 11(d) error harmless where the contemporaneous written plea agreement signed by the defendant stated that his decision to plead guilty was not the result of force or threats).

45. Placing the burden on the Government rather than the defendant on direct appeal

prosecution to show, based solely on the record before the appellate court, that a district court's failure to follow a provision of the rule was harmless.[46] The Seventh Circuit has gone so far as to hold that, when a district court violates rule 11, "unless strong indications to the contrary are apparent from the record a court should *presume* [the Rule 11 violation] influenced a defendant's decision to plead guilty."[47] Like the Seventh Circuit in *Padilla*, the Ninth Circuit has engaged in such a "presumption" of prejudice to a defendant.[48] Although the Fourth Circuit "ha[s] declined to go as far as the Seventh Circuit in endorsing a presumption that a Rule 11 failure [by a district

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comports with the Court's cases applying the harmless error doctrine in other criminal law contexts. *See, e.g.*, O'Neal v. McAninch, 513 U.S. 432, 437-39 (1995) (burden on prosecution to show lack of harm where constitutional violation is shown on federal habeas corpus review); United States v. Olano, 507 U.S. 725, 734 (1993) (burden on prosecution to show lack of harm under Fed. R. Crim. P. 52(a) with respect to nonconstitutional error raised on direct appeal in federal system); Chapman v. California, 386 U.S. 18, 24 (1967) (burden on prosecution to show constitutional error was harmless "beyond a reasonable doubt" on direct appeal in federal or state systems). If a rule 11 error rises to the level of a constitutional violation—such as a district court's failure to explain the nature of the charges or warn the defendant of the statutory range of punishment, *see, e.g.*, Boykin v. Alabama, 395 U.S. 238 (1969)—then the Government's burden should be to establish that the error was "harmless beyond a reasonable doubt" under *Chapman*. *See* Keel v. United States, 585 F.2d 110, 116 n.13 (5th Cir. 1978) (en banc) (Rubin, J., concurring) ("Obviously, if the Rule 11 transgression was serious as to amount to a deprivation of a constitutional right, the *Chapman* test would be applicable.").

46. *See, e.g.*, United States v. Gigot, 147 F.3d 1193, 1199 (10th Cir. 1998) (refusing to deem the district court's rule 11(c)(1) error harmless because "the record contains no evidence [that the defendant] actually did know the elements [of the offense] or the penalties"); United States v. Siegel, 102 F.3d 477, 482 (11th Cir. 1996) ("Contrary to the government's contentions, the district court's failure to [follow] Rule 11[(c)(1)] was not harmless, as there is no evidence in the record [of] the Rule 11 proceeding which demonstrates that Siegel was aware of these maximum and mandatory minimum penalties on these counts."); United States v. Dewalt, 92 F.3d 1209, 1213-14 (D.C. Cir. 1996) ("on direct appeal the Government must show that a Rule 11 violation was harmless in order to prevail" and "[a] district court's failure to comply with Rule 11(c)(1) is harmless if the record reveals . . . that the defendant had actual notice of the information that the district judge failed to convey"); United States v. Hourihan, 936 F.2d 508, 511 (11th Cir. 1991) (refusing to find Rule 11(c)(1) error harmless because "there is no indication in the record that Hourihan knew of the five-year minimum mandatory sentence"); United States v. Young, 927 F.2d 1060, 1062 (8th Cir. 1991) (same); United States v. Syal, 963 F.2d 900, 905 (6th Cir. 1992) (refusing to find a rule 11(c)(1) error harmless because "[i]t is not clear [from the record] that Syal understood each element of the formal criminal charges").

47. United States v. Padilla, 23 F.3d 1220, 1222 (7th Cir. 1994) (emphasis added).

48. *Odedo*, 154 F.3d at 940; United States v. Gutierrez, 1997 WL 409532, at *1 (9th Cir. July 15, 1997) (citing *Padilla*).

court] affects the defendant's decision to plead guilty,"[49] the Fourth Circuit nevertheless refused to deem a district court's rule 11(c)(1) error harmless because there was no "affirmative indication in the record" that the defendant was actually aware of all potential statutory penalties that he was facing when he pleaded guilty.[50]

When the record on appeal is silent regarding a rule 11 admonishment, at least with respect to the "core concerns" of rule 11,[51] such a presumption on direct appeal appears to be required by the Supreme Court's decisions in *Boykin* and *Parke*.[52] A minority of circuits, led by the Fifth Circuit, actually apply the opposite presumption by placing the burden on a defendant to prove his lack of knowledge of the relevant rule 11 information.[53] Such a reverse presumption—requiring proof that the defendant would not have pleaded guilty but for the district court's rule 11 violation—also conflicts with the Supreme Court's decision in *Henderson v. Morgan*, in which the Court held that it was irrelevant whether the defendant would have pleaded guilty notwithstanding the district court's error.[54]

D. Conclusion

Since rule 11(h)'s promulgation in 1983, the United States Courts of Appeals have applied rule 11(h) in hundreds, if not

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49. United States v. Thorne, 153 F.3d 130, 133 (4th Cir. 1998). *But cf.* United States v. Custis, 988 F.2d 1355, 1362-63 (4th Cir. 1993) ("prejudice to the defendant can be presumed on direct appeal when the record does not affirmatively demonstrate that the defendant's plea of guilt[y] was knowing") (citing *Boykin*, 395 U.S. at 244), *aff'd on other grounds*, 511 U.S. 485 (1994).

50. *Thorne*, 153 F.3d at 133-34; *see also* United States v. Goins, 51 F.3d 400, 403-04 (4th Cir. 1995) (although refusing to adopt *Padilla*'s "presumption," nevertheless refusing to find rule 11(c)(1) error harmless because "there is no evidence in the record that Goins was aware that he was facing a mandatory minimum sentence of five years before his plea").

51. The traditional "core concerns" of rule 11 are: "(1) whether the guilty plea was coerced; (2) whether the defendant understands the nature of the charges; and (3) whether the defendant understands the consequences of his plea." United States v. Johnson, 1 F.3d 296, 300 (5th Cir. 1993) (en banc).

52. *Boykin*, 395 U.S. at 242-43; Parke v. Raley, 506 U.S. 20, 29 (1992).

53. *See, e.g.*, United States v. Vasquez-Bernal, 197 F.3d 169, 170-71 (5th Cir. 1999); United States v. Ferguson, 60 F.3d 1, 4 (1st Cir. 1995); United States v. de le Puente, 755 F.2d 313, 315 (3d Cir. 1985)).

54. Henderson v. Morgan, 426 U.S. 637 (1976); *see supra* note 26.

thousands, of criminal cases in which defendants have sought to vacate their guilty pleas based on district courts' violations of rule 11 at guilty plea proceedings.[55] However, the United States Supreme Court has never addressed—or even cited—rule 11(h), although the Court's harmless error jurisprudence in other criminal contexts has greatly developed during the past decade or so.[56] Inexplicably, the Supreme Court denied certiorari in *Vasquez-Bernal v. United States*,[57] even though Vasquez-Bernal's petition for a writ of certiorari clearly called the Court's attention to the division among the federal circuits.

Supreme Court rule 10(a) provides that a division among the United States Courts of Appeals on a particular issue is a traditional basis for the Supreme Court to grant certiorari and address the circuit-splitting issue. In view of the disarray among the lower courts, the United States Supreme Court should grant certiorari and address the proper application of rule 11(h)'s harmless error standard. In accord with the Advisory Committee Notes and the Court's prior guilty plea jurisprudence, the Court should overrule the minority of circuits that place the burden on the defendant to show that, but for the rule 11 error, he would not have pled guilty.

55. Rule 11(h) has been cited over 300 times in federal cases reported on Westlaw. Of course, the vast majority of criminal appeals today are resolved in unpublished opinions that are not reported on Westlaw.

56. *See, e.g.*, United States v. Olano, 507 U.S. 725 (1993) (addressing the application of Fed. R. Crim. P. 52(a) & (b) to "trial errors" in criminal cases); Brecht v. Abrahamson, 507 U.S. 619 (1993) (addressing the application of the harmless error standard to constitutional claims of trial error raised on federal habeas corpus review).

57. 120 S. Ct. 966 (2000).